STATE OF MINNESOTA

IN SUPREME COURT

C3-84-2138

PROMULGATION OF AMENDMENTS TO THE RULES OF EVIDENCE

ORDER

The Supreme Court Advisory Committee on Rules of Evidence has recommended certain amendments to the Rules of Evidence.

The Supreme Court held a hearing on these amendments on June 20, 2006, and is advised fully in the premises.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The attached amendments to the Rules of Evidence be, and the same hereby are, prescribed and promulgated for the regulation of the practice and procedure of law in the courts of the State of Minnesota.

2. The inclusion of Advisory Committee comments is made for convenience and does not reflect court approval of the comments made therein.

3. These amendments to the Rules of Evidence shall be effective September 1, 2006.

Dated: July 18, 2006

BY THE COURT:

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Russell A. Anderson
Chief Justice

AMENDMENTS TO THE MINNESOTA RULES OF EVIDENCE

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*. In case the ruling is one admitting evidence a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. Upon request of any party, the court shall place its ruling on the record. The court may direct the making of an offer in question and answer form

(**c) Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Error. Nothing in this rule precludes taking notice of errors in fundamental law or of plain errors affecting substantial rights although they were not brought to the attention of the court.

Advisory Committee Comment—2006 Amendments

Rule 103(a).

This amendment in rule 103(a) is taken from the corresponding Fed. R. Evid. 103 and would codify existing practice in Minnesota. *See* Minn. R. Evid. 103(a) comm. cmt.—1989 ("Under current practice, a motion in limine to strike or prohibit the introduction of evidence operates as a timely objection and obviates the requirement of any further objection with respect to such evidence."); *Myers v. Winslow R. Chamberlain Co.*, 443 N.W.2d 211, 216 (Minn. App. 1989) (ruling that objections on the record in chambers need not be repeated at trial to preserve the issue for review). *But see State v. Litzau*, 650 N.W.2d 177, 183 (Minn. 2002) ("Ordinarily, a party need not renew an objection to the admission of evidence to preserve a claim of error for appeal following a ruling on a motion in limine. If, however, excluded evidence is offered at trial because the court has changed its initial ruling, the objection should be renewed at trial.") (citation omitted).

The federal rule refers to preserving the claim of error "for appeal." In civil cases in Minnesota to preserve the evidentiary ruling for appeal, in addition to a timely and specific objection, the claim also must be included in a motion for new trial. *Sauter v. Wasemiller*, 389 N.W.2d 200, 201-02 (Minn. 1986).

The amendment does not prevent an attorney from making an offer of proof where appropriate, or from renewing an objection. Repetitive, cumulative objections should be avoided, but occasionally the context at trial is more developed and may be different from what was anticipated at the time of the former ruling, justifying a renewed objection and perhaps a different ruling.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

(3) *Character of witness*. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a criminal prosecution, such evidence shall not be admitted unless ~~the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence~~ 1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; 2) the prosecutor clearly indicates what the evidence will be offered to prove; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor's case; and 5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant. Evidence of past sexual conduct of the victim in prosecutions involving criminal sexual

conduct, including attempts or any act of criminal sexual predatory conduct ~~under Minnesota Statutes, sections 609.342 to 609.346~~ is governed by ~~Minn. R. Evid.~~ **rule** 412.

Advisory Committee Comment—2006 Amendments

Rule 404(b).

Rule 404(b) has been revised to reflect the five part test that trial courts must apply in determining whether to admit other act evidence under the rule. *See State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006); *State v. McLeod*, 705 N.W.2d 776, 787 (Minn. 2005); *Angus v. State*, 695 N.W.2d 109, 119 (Minn. 2005); *State v. Asfeld*, 662 N.W.2d 534, 542 (Minn. 2003). In applying the test, the court should first determine the precise purpose or fact for which the evidence was offered and the relevance of the proffered evidence to that particular purpose or fact. Only after finding that the proffered evidence is relevant to a pertinent purpose or fact should the trial court apply the fifth prong's balancing test. *See Ness*, 707 N.W.2d at 686. The *Ness* opinion further held that the "need" requirement first enunciated in *State v. Billstrom*, 276 Minn. 174, 178-79, 149 N.W.2d 281, 284 (1967), is not an "independent requirement of admissibility" but is to be addressed in the context of the fifth prong's balancing test. *Ness*, 707 N.W.2d at 690.

The intent of the revision is, in part, to provide a clear balancing test to be applied in determining the admissibility of other acts evidence. The Minnesota Supreme Court has used conflicting language when describing the trial court's task. *See generally* James A. Morrow, Peter N. Thompson & Alfred C. Holden, *Weighing* Spreigl *Evidence: In Search of a Standard*, 60 BENCH & B. OF MINN. 23 (November 2003). Consistent with the Court's longstanding view that because of the great potential for misuse of this evidence, the trial judge should exclude the evidence in the close case, the Court has instructed the trial judge to exclude the evidence if the probative value is outweighed by the potential for unfair prejudice. In some of the same opinions, however, the Court also referred to the rule 403 balancing test that requires the trial judge to admit the evidence in the close case. Rule 403 requires admission unless the probative value is "substantially" outweighed by the unfair prejudice. Even in *Ness*, an opinion designed to reconcile inconsistent decisions, the Court stated that other act evidence "may not be introduced if its probative value is substantially outweighed by its tendency to unfairly prejudice the factfinder." *Ness*, 707 N.W.2d at 685. However, the *Ness* Court, following *Angus*, 695 N.W.2d at 119, *Asfeld*, 662 N.W.2d at 542, and *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998), held that the fifth prong as stated in rule 404(b)(5) is the appropriate balancing test for other acts evidence. *Ness*, 707 N.W.2d at 689-93. This test focuses on whether the probative value is outweighed by the potential for unfair prejudice. A

slight balance in favor of unfair prejudice requires exclusion. Since this test is a more stringent test, evidence that satisfies this balancing test will certainly satisfy rule 403.

Rule 404(b) also changes the description of the cases where rule 412 is applicable. Consistent with rule 412, the description is no longer dependent on statute numbers thereby alleviating the need to revise the evidence rule whenever criminal statutes are renumbered, amended, or added.

Similar conduct by the accused against a victim of domestic abuse or against other family or household members is governed by Minn. Stat. § 634.20 (2004). In *State v. McCoy*, 682 N.W.2d 153, 159-61 (Minn. 2004), the supreme court held that the clear and convincing evidence standard of rule 404(b) does not apply when evidence is offered under the statute.

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. ~~in connection with the event~~. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Advisory Committee Comment—2006 Amendments

The amendment comes from Fed. R. Evid. 407, which was added in 1997. The amending language makes it clear that to merit protection under the rule the remedial measure must come after the accident or injury. This approach is consistent with current practice in Minnesota. *See Myers v. Hearth Techs., Inc.*, 621 N.W.2d 787, 792 (Minn. App. 2001) (finding changes made before the accident do not qualify as subsequent remedial measures); *Beniek v. Textron, Inc.*, 479 N.W.2d 719, 723 (Minn. App. 1992) (finding that design changes after plaintiff purchased the product, but before the accident, are not excluded by this rule).

In addition, the language insures that the protection under the rule does not depend on the legal theory advanced at trial. The Minnesota

Supreme Court has already ruled that subsequent remedial measures are not admissible to prove defect in design defect cases. *See Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 97-98 (Minn. 1987). The 1989 Minnesota Supreme Court Advisory Committee Comment to rule 407 provided that subsequent remedial measures "are also inadmissible in failure to warn cases in view of *Bilotta v. Kelly Co. Inc.*, 346 N.W.2d 616 (Minn. 1984) which held that design defect and failure to warn cases can be submitted to the jury on a single theory of products liability." The amended language would also make subsequent remedial measures inadmissible to prove that a product was defective in a pure strict liability or a breach of warranty case.

Rule 412. Past Conduct of Victim of Certain Sex Offenses

(1) In a prosecution for acts of criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct, ~~under Minnesota Statutes, sections 609.342 to 609.346~~, evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in rule 412. Such evidence can be admissible only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the following circumstances:

(A) When consent of the victim is a defense in the case,

(i) evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue, relevant and material to the issue of consent;

(ii) evidence of the victim's previous sexual conduct with the accused; or

(B) When the prosecution's case includes evidence of semen, pregnancy or disease at the time of the incident or, in the case of pregnancy, between the time of the

incident and trial, evidence of specific instances of the victim's previous sexual conduct, to show the source of the semen, pregnancy or disease.

(2) The accused may not offer evidence described in rule 412(1) except pursuant to the following procedure:

(A) A motion shall be made by the accused prior to the trial, unless later for good cause shown, setting out with particularity the offer of proof of the evidence that the accused intends to offer, relative to the previous sexual conduct of the victim.

(B) If the court deems the offer of proof sufficient, the court shall order a hearing out of the presence of the jury, if any, and in such hearing shall allow the accused to make a full presentation of the offer of proof.

(C) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the accused regarding the previous sexual conduct of the victim is admissible under the provisions of rule 412(1) and that its probative value is not substantially outweighed by its inflammatory or prejudicial nature, the court shall make an order stating the extent to which such evidence is admissible. The accused may then offer evidence pursuant to the order of the court.

(D) If new information is discovered after the date of the hearing or during the course of trial, which may make evidence described in rule 412(1) admissible, the accused may make an offer of proof pursuant to rule 412(2), and the court shall hold an in camera hearing to determine whether the proposed evidence is admissible by the standards herein.

Advisory Committee Comment—2006 Amendments

The amendment is intended to clarify the reach of the rape shield rule. The amendment provides a general description of the types of cases in which this rule is applicable. The rule is drafted broadly enough to incorporate offers of evidence against alleged victims in prosecutions brought under the new sexual predator laws. *See, e.g.*, Minn. Stat. § 609.3453 (Supp. 2005) (criminal sexual predatory conduct). The language in the amendment can accommodate future statutory changes without requiring that the rule be amended. Similar language is also included in the amendment to rule 404. The rape shield rule should be applicable in all cases where the accused is offering evidence of the past sexual conduct of the alleged victim.

Rule 604. Interpreters

Advisory Committee Comment—2006 Amendments

Interpreters who have not been qualified as experts should not be allowed to provide their opinion about the content of questions and answers involving persons who do not speak English or are handicapped in communication. The specific rules governing the qualifications of interpreters are set forth in Minn. Gen. R. Prac. 8. This rule provides that an interpreter who is listed on the statewide roster as a certified court interpreter is presumed competent to interpret in all court proceedings. Minn. Gen. R. Prac. 8.02(a). Most court interpreters on the statewide roster, however, have not passed the stringent tests and are not certified. Interpreters on the statewide roster but not certified, or those interpreters not on the roster, must be qualified as expert witnesses before providing interpretation. Judges should use the screening standards developed by the State Court Administrator to determine whether the non-certified interpreter is qualified. *See* Minn. Gen. R. Prac. 8.02(c). The State Court Administrator standards are available at:
http://www.courts.state.mn.us/documents/0/Public/Interpreter_Program/voir_dire.doc

Rule 608. Evidence of Character and Conduct of Witness

(a) **Opinion and reputation evidence of character**. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or

untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct**. Specific instances of the conduct of ~~a~~ the witness, for the purpose of attacking or supporting the witness' character for truthfulness ~~credibility~~, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(c) **Criminal cases.** The prosecutor in a criminal case may not cross-examine the accused or defense witness under subdivision (b) unless (1) the prosecutor has given the defense notice of intent to cross-examine pursuant to the rule; (2) the prosecutor is able to provide the trial court with sufficient evidentiary support justifying the cross-examination; and (3) the prosecutor establishes that the probative value of the cross-examination outweighs its potential for creating unfair prejudice to the accused.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Advisory Committee Comment—2006 Amendments

Rule 608 (b).

The amendment in rule 608(b) comes from the amendment to Fed. R. Evid. 608(b), which was added in 2003. The language clarifies that the restriction on extrinsic evidence applies only if the witness is being impeached on the issue of character for truthfulness. If the witness is impeached by evidence of bias the denial may be contradicted by extrinsic evidence. For example, if a witness denies the plaintiff is her son, the denial may be challenged by extrinsic evidence. If the witness denies that she lied on a job application, the denial may not be disproved by extrinsic evidence.

The limitation on extrinsic evidence applies only to evidence that requires testimony from another witness. Counsel may contradict the witness with evidence offered through the testimony of the witness being impeached. For example, if the witness denies lying on a job application, counsel may try to refresh the witness' recollection by showing the witness the application. Counsel may offer the job application if the foundation for admitting it can be established through the testimony of the witness being impeached. If the witness denies lying on a job application, and the lie cannot be established through cross-examination of that witness, counsel may not disprove the denial by calling another witness. Because this is an inquiry into a collateral matter counsel may not call a rebuttal witness to lay the foundation for admitting the job application and proving the lie. *Compare Carter v. Hewitt*, 617 F.2d 961, 969-70 (3d Cir. 1980) (admitting, as non-extrinsic evidence, a letter that defendant admitted authoring) *with United States v. Martz*, 964 F.2d 787, 788 (8th Cir. 1992) (precluding defendant from introducing witness' plea agreements after witness denied making any agreement stating that documents are not admissible under rule 608(b) "merely to show a witness' general character for truthfulness"). *See generally* ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 485 (2d ed. 2004).

Rule 608 (c).

Rule 608(c) incorporates the holding in *State v. Fallin*, 540 N.W.2d 518, 522 (Minn. 1995) (placing burden on the prosecutor before allowing cross-examination of defendant or defense witnesses about acts of misconduct reflecting on truthfulness). The balancing test taken from *Fallin* is not the rule 403 test favoring admissibility unless probative value is "substantially outweighed" by unfair prejudice. Under this test the court should not allow the cross-examination if probative value and unfair prejudice are closely balanced. *Fallin*, 540 N.W.2d at 522. The evidence

should not be allowed unless probative value on the issue of credibility outweighs the potential for unfair prejudice.

The rule follows the holding in *Fallin*. Neither the rule nor the Court's opinion addresses the issue of whether the accused or a party in a civil case must provide notice and satisfy the same evidentiary standard if counsel attempts to impeach a witness under this rule. Ethical requirements in Minn. R. Prof. Cond. 3.4(e) would be applicable in all cases to restrict lawyers from alluding "to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." Nothing in this rule would limit the rights and obligations in discovery. The Committee recognizes that in some circumstances Minn. R. Crim. P. 9 provides for differing obligations of discovery between the prosecutor and the defense. *See also State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998) ("Discovery rules are 'based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial' and are 'designed to enhance the search for truth'") (citations omitted).

Rule 614. Calling and ~~Interrogation of~~ Interrogating Witnesses ~~by Court~~

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

(d) Juror interrogation in criminal trials. Jurors may not suggest questions or interrogate witnesses in criminal trials.

Advisory Committee Comment—2006 Amendments

The amendment precluding juror questioning in criminal cases codifies the holding in *State v. Costello*, 646 N.W.2d 204, 214-15 (Minn. 2002). Consistent with the opinion in *Costello*, the rule does not address the issue of whether jurors may ask questions in civil cases.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

Advisory Committee Comment—2006 Amendments

The amendment codifies existing Minnesota case law on the admissibility of expert testimony. The trial judge should require that all expert testimony under rule 702 be based on a reliable foundation. The proposed amendment does not purport to describe what that foundation must look like for all types of expert testimony. The required foundation will vary depending on the context of the opinion, but must lead to an opinion that will assist the trier of fact. If the opinion or evidence involves a scientific test, the case law requires that the judge assure that the proponent establish that "'the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.'" *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000) (quoting *State v. Moore*, 458 N.W.2d 90, 98 (Minn. 1990)).

In addition, if the opinion involves novel scientific theory, the Minnesota Supreme Court requires that the proponent also establish that the evidence is generally accepted in the relevant scientific community. The rule does not define what is novel, leaving this for resolution by the courts. *See, e.g.*, *State v. Klawitter*, 518 N.W.2d 577, 578-86 (Minn. 1994) (addressing whether 12-step drug recognition protocol involves novel

scientific theory); *State v. Hodgson*, 512 N.W.2d 95, 98 (Minn. 1994) (ruling that bite-mark analysis does not involve novel scientific theory).

The Minnesota Supreme Court provided the standard for admissibility of novel scientific testimony in *Goeb*. The court stated:

> Therefore, when novel scientific evidence is offered, the district court must determine whether it is generally accepted in the relevant scientific community. *See Moore*, 458 N.W.2d at 97-98; *Schwartz*, 447 N.W.2d at 424-26. In addition, the particular scientific evidence in each case must be shown to have foundational reliability. *See Moore*, 458 N.W.2d at 98; *Schwartz*, 447 N.W.2d at 426-28. Foundational reliability "requires the 'proponent of a * * * test [to] establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.'" *Moore*, 458 N.W.2d at 98 (alteration in original) (quoting *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977)). Finally, as with all testimony by experts, the evidence must satisfy the requirements of Minn. R. Evid. 402 and 702—be relevant, be given by a witness qualified as an expert, and be helpful to the trier of fact. *See State v. Nystrom*, 596 N.W.2d 256, 259 (Minn. 1999).

Goeb, 615 N.W.2d at 814.

In *State v. Roman Nose*, 649 N.W.2d 815, 819 (Minn. 2002), the court described the standard in a different way:

> Put another way, the *Frye-Mack* standard asks first whether experts in the field widely share the view that the results of scientific testing are scientifically reliable, and second whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls.

Finally, in *State v. MacLennan*, 702 N.W.2d 219, 230 (Minn. 2005) the court explained the standard:

> Under the *Frye-Mack* standard, a novel scientific theory may be admitted if two requirements are satisfied. The district court must first determine whether the novel scientific evidence offered is generally accepted in the relevant scientific community. Second, the court must determine whether the novel scientific evidence offered is shown to have foundational reliability. As with all expert testimony,

> the evidence must comply with Minn. R. Evid. Rules 402 and 702; that is, it must be relevant, helpful to the trier of fact, and given by a witness qualified as an expert. The proponent of the novel scientific evidence bears the burden of establishing the proper foundation for the admissibility of the evidence.

(Citations omitted).

ARTICLE 8. HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

* * * *

(d) Statements which are not hearsay. A statement is not hearsay if:

* * * *

(2) ~~Admission~~ Statement by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of the party. In order to have a coconspirator's declaration admitted, there must be a showing, by a preponderance of the evidence, (i) that there was a conspiracy involving both the declarant and the party against whom the statement is offered, and (ii) that the statement was made in the course of and in furtherance of the conspiracy. In determining whether the required showing has

been made, the Court may consider the declarant's statement; provided, however, the declarant's statement alone shall not be sufficient to establish the existence of a conspiracy for purposes of this rule. The statement may be admitted, in the discretion of the Court, before the required showing has been made. In the event the statement is admitted and the required showing is not made, however, the Court shall grant a mistrial, or give curative instructions, or grant the party such relief as is just in the circumstances.

Advisory Committee Comment—2006 Amendments

Right to Confrontation.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court adopted a new approach to Sixth Amendment confrontation analysis. The Court ruled that admitting against the accused "testimonial" hearsay from an unavailable declarant, violates the Sixth Amendment right to confrontation, absent a prior opportunity for cross-examination. The *Crawford* court stated,

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in the development of hearsay law—as does [*Ohio v.*] *Roberts*, and as would an approach that exempted such statement from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Crawford, 541 U.S. at 68.

The *Crawford* court did not define what constitutes "testimonial" hearsay. *See id*. Some types of evidence appear to be testimonial no matter how the term is defined. For example, courtroom testimony, including testimony at a preliminary hearing, or affidavits are testimonial, as are guilty pleas, allocutions, and grand jury testimony. The *Crawford* court also stated, "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id*. at 52.

The full implications of this new approach to Sixth Amendment interpretation is presently being worked out in the courts. *See, e.g*., *State v. Hannon*, 703 N.W.2d 498, 507 (Minn. 2005) (ruling that testimony from a witness at the defendant's prior trial did not violate the defendant's right of confrontation where the witness was unavailable, the defendant had an

opportunity to cross-examine at the first trial, and the state's theory of the case had not substantially changed); *State v. Martin*, 695 N.W.2d 578, 584-86 (Minn. 2005) (holding that a dying declaration does not violate a defendant's Sixth Amendment right to confrontation because the Sixth Amendment did not repudiate dying declarations, which were readily admissible at early common law).

Rule 801(d)(2).

The change in the title to rule 801(d)(2) conforms the title of the rule to the text. The amended title clarifies that the statement by a party opponent need not be an "admission" of guilt or liability in order to be excluded from the definition of hearsay.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

*** * * ***

~~**(24) Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address, and present whereabouts of the declarant.~~

Advisory Committee Comment—2006 Amendments

Rule 803(24).

The substance of this rule is combined with rule 804(b)(5) in new rule 807.

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * *

~~(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address and present whereabouts of the declarant.~~

Advisory Committee Comment—2006 Amendments

Rule 804(b)(5).

The substance of this rule is combined with rule 803(24) in new rule 807.

Rule 807. Residual Exception

A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing, to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address and present whereabouts of the declarant.

Advisory Committee Comment—2006 Amendments

The new rule 807 is taken from Fed. R. Evid. 807 and combines rules 803(24) and 804(b)(5). The rule requires the proponent to disclose, if known, the name, address and present whereabouts of the declarant. In criminal cases, offering hearsay statements against the accused from declarants who do not testify and are not subject to cross-examination, may implicate the constitutional right to confrontation.